Supreme Court, U.S.
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No. 95-2038

In The

Supreme Court of the United States

October Term, 1995

JOHN MINCIELI,

Petitioner,

vs.

AUDREY BRUDER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTORY STATEMENT

In her Brief in Opposition, Respondent, AUDREY BRUDER (Defendant, BRUDER), cites to the Transcript of Trial as follows:

T. (volume) - (page number).

Additionally, throughout her Brief in Opposition, BRUDER refers to the Petitioner, JOHN MINCIELI, as either "Plaintiff" or "MINCIELI" and cites to the Petition for Writ of Certiorari as follows:

P. (page).

STATEMENT OF THE CASE AND FACTS

i) Course of Proceedings and Disposition in the Courts Below

The parties tried this action before the Honorable Shelby Highsmith, United States District Court, Southern District of Florida, and a jury from Monday, January 3, 1994 through Thursday, January 6, 1994. At the close of Plaintiff's case in chief, Defendant moved for Judgment as a Matter of Law in accordance with F.R.C.P. 50(a). The court denied the motions. Defendant renewed the motions to the close of all of the evidence. The court denied the renewed motion as to Plaintiff's claim of arrest without probable cause, but granted Defendant's motion as to MINCIELI's claim that BRUDER performed an unreasonable search and seizure of Plaintiff's premises

and property.[1] On Thursday, January 6, 1994, the jury returned a verdict for the Plaintiff.

On January 14, 1994, Defendant renewed her Motion for Judgment as a Matter of Law pursuant to F.R.C.P. 50(b). On March 7, 1994, the district court granted Defendant's Renewed Motion and entered Final Judgment for Defendant.[2], [3]

Plaintiff appealed to the United States Court of Appeals for the Eleventh Circuit. In a one sentence, PER CURIAM opinion, the Eleventh Circuit affirmed. The Court of Appeals denied MINCIELI's Petitions for Rehearing/Rehearing En Banc on March 7, 1996, and Plaintiff's Petition for Writ of Certiorari followed.[4]

ii) Statement of the Facts

MINCIELI sued BRUDER pursuant to 42 U.S.C. § 1983 claiming that BRUDER, a police detective employed by the City of Sunrise, Florida, arrested

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[1] Plaintiff did not challenge the District Court's judgment as a matter of law on the premises search and seizure issue in the Court of Appeals, and does not do so here.

[2] In his Petition, MINCIELI represents that "A week later the district court took the victory away." (P.6). That representation is false. The district court issued its ruling two months after the jury verdict.

[3] The district court's Order Granting Defendant's Renewed Motion for Judgment as a Matter of Law is reprinted by Petitioner at App. 2-16 of the Petition.

[4] The court of appeals' PER CURIAM opinion is reprinted by Petitioner at App.1 of the Petition, and the Order denying Petitions for Rehearing/Rehearing En Banc is at App. 17-18.

MINCIELI without probable cause and performed an unreasonable search and seizure of MINCIELI's premises and property. In her answer and Defenses, BRUDER raised qualified immunity as an affirmative defense to the action.

In August, 1988, MINCIELI was the owner of a motor vehicle towing and body shop operation in the City of Sunrise.[5] (T.I-111 et seq.). BRUDER responded to MINCIELI's place of business on August 25, 1988 to investigate MINCIELI's report of the vandalism and burglary of several vehicles. (T.I-235). One of he vehicles was a 1986 Subaru registered to Judie Rochelle Minkoff (Minkoff). (T.I-235). BRUDER requested ownership information on the subject vehicles, including the 1986 Subaru; however, MINCIELI was unable to provide any ownership information on August 25, 1988. (T.I-235). BRUDER instructed MINCIELI to compile the ownership information, indicating that she would return at another time to complete her reports. (T.I-235-36).

BRUDER returned to MINCIELI's place of business four days later, on August 29, 1988. (T.I-236). At that time, MINCIELI provided BRUDER with a Certificate of Title to the Subaru which showed Judie Minkoff as the owner. (T.I-236). According to MINCIELI, when BRUDER first inspected the Certificate of Title to the Subaru on August 29, 1988, the "Transfer of Title" section on the back of the Certificate was blank but for he unnotarized signature of Minkoff as the seller. (T.I-121-; T.I-144). MINCIELI

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[5] The towing business was known as American Towing, Inc. and the body shop was known as Eastern Motors, Inc.

testified that he explained to BRUDER that he had acquired ownership of the Subaru by operation of Florida's towing lien law and/or by virtue of a trade-in by Judie Minkoff for another vehicle, and that Minkoff had signed the title over to MINCIELI several months prior, most likely in February of 1988. (T.I-128; T.I-132).

Subsequent to August 29, 1988, MINCIELI advised BRUDER that MINCIELI had sold the Subaru to a friend and neighbor, Daniel Kaplan, and that MINCIELI was no longer in possession of the Certificate of Title. (T.I-237). BRUDER thereafter requested and obtained the "body file" on the Subaru from the State of Florida, Division of Motor Vehicles, in Tallahassee. Contained within the body file was Minkoff's Certificate of Title to the Subaru, which included a completed "Transfer of Title" section on the back of the Certificate. (T.I-241 et seq.). The Completed Transfer of Title stated that Daniel Kaplan had purchased the Subaru *directly* from Minkoff, not from MINCIELI, and that Minkoff had sworn to and subscribed the transfer on August 26, 1988. (T.I-241 et seq.). BRUDER knew that the "Transfer of Title" section was completed *after* her viewing the Transfer signed in blank on August 29, 1988, yet MINCIELI had notarized the Transfer of Title as being "Sworn to and Subscribed Before Me this 26 day of August, 1988." (T.I-176 through 177). MINCIELI admitted that he notarized the Transfer of Title on August 29, 1988, that he back-dated the acknowledgment to August 26, and that MINCIELI (or American Towing, Inc. or Eastern Motors, Inc.), not Minkoff, sold the Subaru to Daniel Kaplan. (T.I-173; T.I-177).

Additionally, the Transfer of Title which BRUDER received from the Division of Motor Vehicles reflected an

odometer reading date of December 18, 1987. MINCIELI testified that he first came into possession of the Subaru on December 26, 1987 (T.I-128); therefore, MINCIELI's acknowledgment of a December 18, 1987 odometer reading date was false.

Prior to applying for a capias, BRUDER met with the State Attorney's Office (the State of Florida's prosecutorial body) to seek advice as to what crimes, if any, had been committed. (T.I-244-45). BRUDER's investigative file included all of the information specifically recited above but for a sworn statement of Daniel Kaplan, which statement BRUDER subsequently obtained at the suggestion of the State Attorney. (T.I-247). The information presented to the State Attorney's office included a bill of sale BRUDER had obtained from Minkoff reflecting that MINCIELI had sold Minkoff another vehicle for $500.00 cash and that MINCIELI had taken the subject Subaru as a $1,500.00 "trade-in." (T.I-245).

Upon reviewing the investigative file, the State Attorney's Office advised BRUDER of four potential felony charges (T.I-245) which BRUDER ultimately listed as the charges against MINCIELI in her probable cause affidavit. (T.I-249). After obtaining Daniel Kaplan's sworn statement and preparing the probable cause affidavit, BRUDER again presented her entire file to the State Attorney. (T.I-249).

At that time, BRUDER undisputedly had knowledge of the following facts and circumstances:

1. That MINCIELI's August 26, 1988 acknowledgment date on the Transfer of Title was False (T.I-173);

2. That the actual date of MINCIELI's notarization of the Transfer of Title was August 29, 1988 (T.I-173);

3. That Judie Minkoff had subscribed the Transfer of Title several months prior to August 29, 1988 (T.I-174-75);

4. That the transaction recited and notarized by MINCIELI in the Transfer of Title, that is, a direct sale from Minkoff to Daniel Kaplan, was false (T.I-177); and

5. That the December 8, 1987 odometer reading date notarized by MINCIELI was inherently false, as MINCIELI did not possess the vehicle prior to December 26, 1987, and did not receive Minkoff's subscription on the Transfer of Title prior to late February, 1988. (T.I-128-29; T.I-132).

The State Attorney's office subsequently informed BRUDER that a capias had been issued, and BRUDER arrested MINCIELI on felony charges of grand theft in violation of Fla.Stat. § 812.014, dealing in stolen property in violation of Fla.Stat. § 812.019(1), notary false acknowledgment in violation of Fla.Stat. § 117.09(2), and false application for motor vehicle title in violation of Fla.Stat. § 319.33. The charges were all third degree felonies under Florida law.[6] (T.I-250).

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[6] In his Petition, MINCIELI cites the *1994* versions of Fla.Stat. § 812.014 and § 812.019(1), the *1982* version of Fla.Stat. § 117.09, and the *1989* version of Fla.Stat. § 319.33 as the applicable law. The district court used *none* of those statutes in instructing the jury on the law; rather, the court specifically used the statutes that were in effect on the date of arrest. (T.III-466). The district court's instructions to the jury regarding the statutes are at T.IV-557-59. Plaintiff's misrepresentation of

CORRECTION OF MISSTATEMENTS IN PETITION

Rule 15.2, Supreme Court Rules, compels BRUDER to address misstatements of fact or law contained in the Petition. The instant Petition contains both patent misrepresentation and misleading omission. Respondent's Statement of the Case and Facts, supra, corrects the misstatements; however, Respondent specifically identifies each misstatement/misrepresentation below.

First, each of the Petition's two "Questions Presented for Review" (P.i) or, more appropriately, the two grounds urged for granting the Writ, proceed upon a blatantly erroneous premise. The premise underlying Question I is that BRUDER did not raise the defense of qualified immunity "for the first time" until trial. (P.i). That representation is patently false. In her Answer and Defenses, filed over two years prior to trial, BRUDER asserted the affirmative defense of qualified or "good faith" immunity as required by *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 102 S.Ct. 2727, 2736 (1982). The case proceeded to trial in the face of the qualified immunity defense; nevertheless, qualified immunity ultimately remained a question of law for the court's determination. See, *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092 (1986).

Additionally, the language of Question I suggests that the jury was instructed on qualified immunity and found for the Plaintiff on that issue. It is true that the

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applicable state law notwithstanding, the Petition does *not* challenge the district court's instructions to the jury. The law is as the district court gave it; each of the four offenses was a third degree felony on the date of arrest.

district court, over BRUDER's objection, instructed the jury on qualified immunity. Notwithstanding the erroneous instruction, however, the interrogatory form of verdict provided to the jury, without objection from Plaintiff, asked simply:

> Do you find from a preponderance of the evidence that the defendant violated plaintiff's constitutional rights **by arresting him without probable cause** under the circumstances described by the Court in it's instructions? (T.IV-573), emphasis added.

Despite Petitioner's suggestion to the contrary, the jury was not asked to determine any issue pertinent to the qualified immunity defense. Again, those issues remained for the court's determination.

The false premise underlying Question II of the Petition (P.i) highlights the disingenuousness of the Petition in its entirety and is in fact fatal to the Petition itself. The premise for Question II is that the law establishing the elements of the third degree felony of fraudulent transfer of a motor vehicle title, Fla. Stat. § 319.33, was clearly established at the time BRUDER arrested MINCIELI but became unsettled by virtue of state court decisions rendered after the arrest. It was the fact that "the law in this area was not clearly established at the time of MINCIELI's arrest" that led the district court to apply qualified immunity. (P.App-14).

Question II's assertion that the law became unsettled only after MINCIELI's arrest is patently erroneous. BRUDER arrested MINCIELI in May of 1989. (T.II-116-17). On April 25, 1989, Florida's Third District Court of Appeal decided *State v. James*, 543 So.2d 288 (Fla.

3d DCA 1989), which conflicted with decisions from Florida's Second District Court of Appeal in holding that specific intent was *not* an element of the third degree felony of fraudulent transfer of a motor vehicle title. At the time of MINCIELI's arrest, therefore, the law was not clearly established as to whether specific intent was an element of the crime, and the District Court's application of qualified immunity on that basis was sound.

In addition to basing his arguments in support of granting certiorari upon erroneous facts, by omission MINCIELI has misstated the record evidence. At page 9 of the Petition, MINCIELI states that BRUDER's affidavit in support of the arrest warrant made no reference to certain information available to BRUDER which demonstrated MINCIELI's ownership of the Subaru. MINCIELI's recitation suggests that BRUDER intentionally omitted exculpatory information from her warrant application.[7] While it is true that BRUDER's affidavit did not recite the alleged ownership information, the record belies any suggestion that BRUDER intentionally omitted the fact.

BRUDER's testimony was undisputed that prior to applying for a capias, BRUDER met with the State Attorney's Office to seek advice as to what crimes, if any, had

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[7] This alleged omission by BRUDER is significant because it is the *only* alleged omission of fact from BRUDER's warrant application. The record is devoid of evidence of any affirmative false statement made by BRUDER in the warrant application, and there is no record evidence to suggest an omission of fact other than that urged by Plaintiff here.

been committed, that BRUDER presented her *entire* investigative file to the State Attorney, and that the investigative file included a bill of sale BRUDER had obtained from Minkoff reflecting that MINCIELI had sold Minkoff another vehicle and had taken the subject Subaru as a "trade-in." (T.I-244-47, 249). BRUDER thereafter prepared a probable cause affidavit based upon the advice received from the State Attorney's Office recommending four felony charges. (T.I-249). Far from being an intentional omission of exculpatory evidence designed to deprive MINCIELI of his constitutional rights, the evidentiary record is clear that BRUDER presented her entire file to the State Attorney, prepared her affidavit in accordance with the State Attorney's advice, and resubmitted her entire file to the State Attorney at the time of the actual application for a capias.[8]

ARGUMENT

Prior to discussing the reasons why certiorari is not warranted in this case, it is important to strip the petition of its rhetoric and identify the arguments actually made by MINCIELI in support of granting certiorari. Just as importantly, as a threshold matter it is important to recognize an argument that the Petition does *not* make. The

[8] BRUDER did not directly apply to the state court for a capias. Rather, BRUDER presented her entire file to the State Attorney and received advice from the State Attorney as to the crimes chargeable. Ultimately, it was the State Attorney who took BRUDER's entire file, including BRUDER's probable cause affidavit, and made application to the court for the capias.

Petition does not take issue with the district court's application of this Court's qualified immunity precedent, specifically *Malley v. Briggs*, supra, and *Harlow v. Fitzgerald*, supra, and their Eleventh Circuit progeny to the facts of this case. Put simply, the Petition does not urge that the lower court applied incorrect law, it only argues that the law was applied incorrectly.

MINCIELI advances two grounds in support of granting certiorari. First, MINCIELI argues that it is improper for a trial court to determine qualified immunity as a matter of law once a case has been submitted to a jury and the jury has found for the plaintiff. At its most basic, MINCIELI's argument is that because BRUDER did not pursue the qualified immunity defense by way of summary judgment motion, the defense was somehow transformed into an issue of fact for the jury's determination.

It is beyond dispute that issues regarding the application of immunity, qualified or otherwise, in a civil rights context are questions of law for the court. See, *Hunter v. Bryant*, 502 U.S. 224, 112 S.Ct. 534 (1991); *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092 (1986); *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982) and cases cited therein. While there is little question that this Court prefers a determination of immunity issues "at the earliest possible stage in litigation," *Hunter v. Bryant*, 502 U.S. at 227, 112 S.Ct. at 536 (citations omitted), there is nothing in this Court's precedent suggesting that the qualified immunity issue is transformed into one of fact where a case proceeds to trial without a prior legal determination of the defense.

This Court's only precedent bearing on the question is the decision in *Malley v. Briggs*, supra. In *Malley*, the trial court did not decide the immunity issue until a Motion for Directed Verdict made at the close of the plaintiff's evidence at the jury trial. *Malley*, 106 S.Ct. at 1095. The First Circuit Court of Appeals reversed the trial court's directed verdict, reasoning that absolute immunity did not apply, and the court of appeals remanded the case for a new trial. This Court affirmed the First Circuit's decision and remanded for proceedings consistent with the Court's opinion. 106 S.Ct. at 1099.

Malley proceeded to trial without a prior determination of the immunity issue. Nevertheless, this Court's majority opinion neither held nor discussed in dicta that having proceeded to trial by jury, the qualified immunity issue became one of fact for the jury rather than one of law for the court. In that regard, *Malley* is instructive by its silence.

Any discussion of whether qualified immunity becomes a jury question upon the commencement of trial is merely academic. The issue is irrelevant in the case at bar, because this jury did not determine the issue of qualified immunity in any event. The jury was instructed on qualified immunity, over BRUDER's specific objections; however, the jury was never asked to determine the issue. Rather, as discussed above, the interrogatory form of verdict inquired only as to whether there was actual probable cause for MINCIELI's arrest. The form of verdict did not provide the jury with any opportunity to assess the objective reasonableness of BRUDER's conduct in

accordance with *Malley v. Briggs* and its progeny.[9] Contrary to MINCIELI's argument, the district court did not improperly substitute its judgment on the qualified immunity issue for that of the jury, because the jury never determined the issue.

Ultimately, the application of qualified immunity in a particular context remains a question of law for the court's determination. If there are indeed disputed facts which require resolution prior to the court's consideration of the qualified immunity issue, then it is the jury's province to determine those disputed facts, leaving the ultimate application of qualified immunity, based upon the facts found by the jury, to the court. See, *Ansley v. Heinrich*, 925 F.2d 1339, 1348 (11th Cir. 1991). In the case at bar, MINCIELI never requested a form of verdict which identified specific disputed issues of fact for the jury's determination. Conversely, BRUDER's Motions for Judgment as a Matter of Law made at the close of Plaintiff's evidence, at the close of all of the evidence, and following the jury verdict, were all predicated upon *undisputed* record facts. The trial court properly granted judgment as a matter of law to BRUDER, applying qualified immunity based upon those undisputed facts.

The argument raised by Question II of the Petition is facially invalid and warrants little discussion. Question II

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[9] MINCIELI did not propose any interrogatory verdict asking the jury to determine the qualified immunity issues. After the court overruled BRUDER's objection to the jury being instructed on the issue of qualified immunity, *BRUDER's* counsel requested a separate interrogatory dealing with the qualified immunity defense which the Court denied. (T.IV-486).

centers around the district court's finding that the law was not clearly established as to whether specific intent to defraud was an element of the crime of fraudulent transfer of a motor vehicle title proscribed by §319.33(e), Fla. Stat., at the time of MINCIELI's arrest. Plaintiff argues that the only Florida appellate decisions which existed at the time of MINCIELI's arrest held that specific intent was required, and that because BRUDER had no evidence of specific intent, her application for capias could not have been objectively reasonable. (P.23). MINCIELI claims that the law only became unsettled, or not clearly established, *after* MINCIELI's arrest when another Florida appellate court opined that intent to defraud was not a necessary element of the crime.

Plaintiff's representation that the law became unsettled only after Plaintiff's arrest is patently false. Florida's Third District Court of Appeal decided the case of *State v. James,* 543 So.2d 288 (Fla. 3d DCA 1989) on April 25, 1989. BRUDER arrested MINCIELI in May of 1989. At the time of MINCIELI's arrest, Florida law was not clearly established as to the requisite intent for what MINCIELI terms the "technical offense"[10] of fraudulent title transfer. Because BRUDER did not violate clearly established law

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[10] In his Petition, MINCIELLI does his best to minimize the fraud charges, going so far as to describe the auto theft and fencing charges as "far more serious and damaging." (P.6). MINCIELLI's characterization of the offenses certainly does not comport with that of the Florida Legislature, which designated each of the four crimes charged as third degree felonies. The legislature clearly considered false notary acknowledgments and fraudulent motor vehicle title transfers to be as "serious and damaging" as grand theft and dealing in stolen property.

in seeking a capias for MINCIELI's arrest, BRUDER remained protected by qualified immunity. The district court's entry of judgment as a matter of law for BRUDER was eminently sound, and the Eleventh Circuit Court of Appeals' per curiam affirmance should not be disturbed.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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